High Court describes the 'relevant approach' to vicarious liability with proviso that the boundaries of the principle are not marked out

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On 5 October 2016, the High Court handed down its decision on *Prince Alfred College Incorporated v ADC*.[1] The court had to determine whether an extension of the limitation period should be granted as provided by s 48 of the *Limitation of Actions Act 1936* (SA). In the judgment the court considered not only the principles relevant for granting an extension, but also the divergent views as to the approach to vicarious liability for intentional acts. Two judgements were delivered, a joint judgment of French CJ, Kiefel, Bell, Keane and Nettle JJ (referred to as the main judgment), and a joint judgment of Gageler and Gordon JJ (referred to as the second judgment). Interestingly, the decision includes what the main judgment describe as 'the relevant approach'[2] to vicarious liability

Decisions of the lower courts

In *Prince Alfred College Incorporated v ADC,* the High Court had to consider whether the Full Court of the South Australian Supreme Court wrongfully extended the time under s 48 of the *Limitation of Actions Act 1936* (SA). Briefly, the facts of the case were that the respondent alleged that the Prince Alfred College had breached its non-delegable duty of care owed to the respondent, and it was vicariously liable for the abuse committed against him by its employee, Bain, a headmaster of the boarding school. To proceed with his case the respondent required an extension of time as the abuse took place when the respondent was 12 years old and the relevant limitation period therefore had expired three years after he attained the age of 18 years, on 17 July 1973.[3]

At first instance, Vanstone J determined that applying the decision of *New South Wales v Lepore; Samin v Queensland Rich v Queensland*[4] led to the conclusion that the non-delegable duty of the appellant did not extend to protecting the respondent against intentional criminal conduct of Bain unless the appellant was at fault. It was held the respondent's argument that the appellant was in breach of its duty was not established.[5] As to the vicarious liability, Vanstone J held that the abuse was not connected to the role of the headmaster and could not be characterised as an unauthorised mode of performing an authorised act, nor was it 'in any sense within the course of Bain's employment'.[6] This conclusion was made despite the fact that the evidence was insufficient to enable her to determine the nature of Bain's designated role. In respect of the extension of the limitation period, Her Honour denied the application, based upon the finding that the effluxion of time was so great that the appellant would have been prejudiced in attempting to defend against the claims.[7]

In the High Court, the main judgment pointed out that this approach was not the correct approach in such cases. Their Honours stated:[8]

> The question whether an extension of time is to be granted is one necessarily antecedent to the determination of any issue in the proceedings relating to liability to which the extension is relevant. Moreover, in a case of this kind – where there had been a very long delay in commencing proceedings and the defendant had raised questions of prejudice arising from its inability to obtain evidence – it was essential that those matters, as relevant to the

> question of extension, be first considered. It is the consideration of those matters which will point to the appropriateness or otherwise of determining any remaining issue in the action where an extension is not to be granted.

It was noted that it was inappropriate for the primary judge to make a determination as to the question of liability when it was found that an extension should not be granted.[9] Further, it appears that the members of the High Court found the primary judge's ability to come to a conclusion as to liability when there was an admitted dearth of evidence was not appropriate.[10]

On appeal, each member of the Full Court found that the appellant was vicariously liable for the conduct of Bain, with Gray J also holding that the appellant had breached its duty even though 'the primary judge had pointed to a dearth of evidence'[11] as to the matters relevant to breach. The court held that an extension of time to bring the proceedings should be granted. Kourakis CJ was of the opinion that the lapse of time 'could sufficiently be addressed by taking a conservative approach to the assessment of damages rather than by denying [the respondent] any redress at all'.[12] Gray J held that the delay in commencing proceedings was the result of the appellant's conduct and that it was just to grant the extension due to the nature and extent of the harm suffered.[13]

High Court discussion on vicarious liability

The important and well-known cases on vicarious liability that examine whether an intentional tort is within the course of employment from the United Kingdom,[14] Canada[15] and Australia[16] are examined. The main judgement then comes to the conclusion that 'the fact that the wrongful act is a criminal offence does not preclude the possibility of vicarious liability'.[17] The relevant approach in cases of this kind is then explained:[18]

> Consequently, in cases of this kind, the relevant approach is to consider any special role that the employer has assigned to the employee and the position in which the employee is thereby placed vis-à-vis the victim. In determining whether the apparent performance of such a role may be said to give the "occasion" for the wrongful act, particular features may be taken into account. They include authority, power, trust, control and the ability to achieve intimacy with the victim. The latter feature may be especially important. Where, in such circumstances, the employee takes advantage of his or her position with respect to the victim, that may suffice to determine that the wrongful act should be regarded as committed in the course or scope of employment and as such render the employer vicariously liable.
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> That approach may be tested against the Canadian cases earlier referred to and against *Lister v Hesley Hall Ltd* and *Mohamud*. It is consistent with the process of reasoning in the more recent Canadian cases in emphasising that, although it is not enough to found vicarious liability that employment provides an opportunity for the commission of a wrongful act, in cases of this kind, factors such as authority, power, trust, control and intimacy may prove critical. It is consistent in result with *Lister v Hesley Hall Ltd*, although different in process of reasoning, for it is apparent that the role assigned to the warden in that case placed him in such a position of power, authority and control vis-à-vis the victims as to provide not just the opportunity but also the occasion for the wrongful acts which were committed.

This approach was endorsed by the other two members of the court, Gageler and Gordon JJ:[19]

> We accept that the approach described in the other reasons as the "relevant approach" will now be applied in Australia. That general approach does not adopt or endorse the generally applicable "tests" for vicarious liability for intentional wrongdoing developed in the United Kingdom or Canada (or the policy underlying those tests), although it does draw heavily on various factors identified in cases involving child sexual abuse in those jurisdictions.
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> The "relevant approach" described in the other reasons is necessarily general. It does not and cannot prescribe an absolute rule. Applications of the approach must and will develop case by case. Some plaintiffs will win. Some plaintiffs will lose. The criteria that will mark those cases in which an employer is liable or where there is no liability must and will develop in accordance with ordinary common law methods. The Court cannot and does not mark out the exact boundaries of any principle of vicarious liability in this case.

Therefore the appropriate enquiry in the case before the High Court was 'whether Bain's role as housemaster placed him in a position of power and intimacy vis-à-vis the respondent, such that Bain's apparent performance of his role as housemaster gave the occasion for the wrongful acts, and that because he misused or took advantage of his position, the wrongful acts could be regarded as having been committed in the course or scope of his employment'.[20] The factual evidence required to determine this issue influenced the High Court's decision as to whether an extension of the limitation period was possible as it raised the question of whether the appellant could have a fair trial.[21]

Extension of time

All seven members of the High Court held that the circumstances of this case did not allow for an extension of time. Section 48 of the *Limitations Act 1936* (SA) allows a court to grant an extension of time is facts material to the plaintiff's case were not ascertained until after the expiration of the limitation period and proceedings are instituted within 12 months after the facts are ascertained. It is for the plaintiff to prove to the court that it is just in all the circumstances for an extension to be granted and that the defendant would not be significantly prejudiced.[22]

The respondent in this case suffered symptoms of a psychological injury from the abuse he suffered at the school which intensified over time. Legal advice was sought in 1996 and 1997 where the need to apply for an extension of time was discussed, the advice being that there was a risk an extension would not be granted. In light of the unlikely chances of success of a claim against the appellant and the cost of litigation, the respondent decided not to commence proceedings. In 1997, the respondent advised the appellant that he would not take action and accepted its offer to pay medical and legal fees to that point and payment of his son's school fees for three years. The respondent's condition grew worse and by 2004 he stopped working and his marriage was deteriorating. He made requests for further support from the appellant, but no further offers were made and in December 2008 he commenced proceedings.

By the time of the commencement of proceedings a number of key witnesses had died and evidence, such as the notes of the respondent's first psychologist, had been lost. The appellant sought to argue that the respondent's injuries were not a consequence of Bain's abuse based upon evidence of a referral to the psychologist from the respondent's doctor which referred to financial

pressures and abuse of alcohol. The fact that the notes of the psychologist had been destroyed significantly prejudiced the appellant's case.[23]

The High Court held that the dearth of evidence as to Bain's role, vital for a determination of liability based on vicarious liability, had not been correctly taken into account by the Full Court. It was noted:[24]

> It could not be assumed that the position in which Bain was placed by his assigned role provided the "occasion" for the offending. The evidence on the respondent's case was that no other housemaster was present in dormitories after lights out and that the prefects were given the role of supervising the boys after that time. This raised a real question about what the role of housemaster entailed, a question which could not fairly be answered given the loss of relevant evidence.

The members of the court of the main judgment noted that the respondent had accepted payment from the appellant and stated that he was not taking action. The main judgment stated that it was 'an error of principle not to regard the arrangements made by the respondent with the school as significant'.[25] Particularly relevant was that the appellant had not negotiated any release from the respondent, demonstrating an understanding that the issue was at an end, and that there was no reluctance on the part of the respondent to commence legal proceedings that could explain the delay as he commenced an action against Bain in 1997. The prejudice along with the length of delay did not allow an extension of time. In contrast, the second judgment treated the issue of an extension of time quite simply – the respondent had made a deliberate decision not to bring proceedings in 1997 and after 11 years changed his mind – therefore it was wrong for the Full Court to have extended time under s 48(3) of the *Limitation Act 1936* (SA).[26]

Royal Commission Recommendation on removal of limitation period

With the release of the report by the Royal Commission into Institutional Responses to Child Sexual Abuse in 2015, much attention has been paid to the recommendation for the removal of limitation periods for claims for damages founded upon personal injury resulting from sexual abuse in an institutional context when the plaintiff was child.[27]

At the time of the report, Victoria had passed the *Limitations of Action Amendment (Child Abuse) Act 2015* (Vic) that amended the principal Act by removing the limitation period for bringing claims for personal injury resulting from child abuse.[28] Since then New South Wales legislation has been amended, as has the Australian Capital Territory law. Section 6A of the *Limitation Act 1969* (NSW) now provides that that an action for damages for death or personal injury resulting from an act or omission that constitutes child abuse is not subject to any limitation period. The amendment in the Australian Capital Territory is not as expansive, only removing the limitation period for personal injury resulting from institutional sexual child abuse.[29]

Bills have also been introduced in Western Australia[30] and Queensland.[31] In the remaining jurisdictions there has been no legislative action yet. The Tasmanian Government has previously indicated that it opposes the removal of limitation periods as there must be 'a careful balance between access to justice for the plaintiff, fair treatment for the defendant, and freer and more certain daily commerce for society'.[32] The Northern Territory Government advised the Royal Commission that in its opinion if the statutory limitation period was to be extended, 'it should

uniformly extended across all jurisdictions' and that the appropriate position is that 'a limitation defence is properly available where the institution has suffered real prejudice in its ability to defend the claim by reason on effluxion of time'.[33] In South Australia it appears as if the availability of the scheme that allows ex gratia compensation to survivors of abuse is seen as the better way to resolve the issue and has the benefits of avoiding litigation and the associated trauma.

Conclusion

The decision of *Prince Alfred College Incorporated v ADC* highlights that an extension of time is discretionary but must take into account the purpose of limitation periods. It is accepted that as time passes the quality of justice deteriorates.[34] A court should not grant an extension lightly, no matter how deserving the plaintiff may be, and a court needs to be wary of making assumptions. For example, Kourakis CJ of the Full Court's opinion that the appellant should done more to anticipate future litigation and protect itself may be understandable, but fails to take into account that on the facts it was reasonable for the appellant to believe that the dispute had been settled.[35]

The Royal Commission when considering limitation periods acknowledged that there are benefits to all parties if civil proceedings are dealt with as close as possible to when the damage is suffered. However, it was satisfied that the limitation period for personal injury arising from child sexual abuse should be removed and be retrospective.[36] It is reassuring to see that many states and territories are moving in the right direction and removing the limitation period as recommended by the Royal Commission, and are in fact going further by not restricting it to sexual abuse in an institutional context.

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[1] *Prince Alfred College Incorporated v ADC* [2016] HCA 37.
[2] Above n 1, at [81].
[3] *Limitation of Actions Act 1936* (SA) ss 36, 45.
[4] (2003) 212 CLR 511; [2003] HCA 4.
[5] *A, DC v Prince Alfred College Incorporated* [2015] SASC 12 at [133]-[134], [151], [166].
[6] Above n 4, at [177].
[7] Above n 4, at [229]-[231].
[8] Above n 1, at [112]
[9] Above n 1, at [9].
[10] The main judgment refers to the fact that the evidence 'did not permit the primary judge to make sufficient findings' (above n 1, at [27]), that any conclusion as to Bain's role was 'speculative' (at [28]) and that the primary judge nevertheless came to a conclusion based upon an assumption: at [29].
[11] Above n 1, at [30].
[12] *A, DC v Prince Alfred College Inc* [2015] SASCFC 161 at [23].
[13] Above n 11, at [148].
[14] *Lloyd v Grace, Smith & Co* [1912] AC 716; *Morris v C W Martin & Sons Ltd* [1966] 1 QB 716; *Lister v Hesley Hall Ltd* [2002] 1 AC 215; *Mohamud v Wm Morrison Supermarkets plc* [2016] AC 677.
[15] *Bazley v Curry* [1999] 2 SCR 534; *Jacobi v Griffiths* [1999] 2 SCR 570; *John Doe v Order of the Oblates of Mary Immaculate in the Province of British Columbia* [2005] 3 SCR 45.
[16] *Deatons Pty Ltd v Flew* (1949) 79 CLR 370; *New South Wales v Lepore; Samin v Queensland Rich v Queensland* (2003) 212 CLR 511; [2003] HCA 4.
[17] Above n 1, at [80].
[18] Above n 1, at [81]-[82].
[19] Above n 1, at [130]-[131].
[20] Above n 1, at [84].

[21] Above n 1 , at [85].
[22] *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541; [1996] HCA 25.
[23] Above n 1, at [103].
[24] Above n 1, at [102].
[25] Above n 1, at [106].
[26] Above n 1, at [125].
[27] Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report*, September 2015, recommendation 85.
[28] The Act inserted Pt IIA, Div 5 'Actions for personal injury resulting from child abuse' into the *Limitations of Actions Act 1958* (Vic) and commenced on 1 July 2015.
[29] *Limitation Act 1985* (ACT) s 21C.
[30] Limitation Amendment (Child Sexual Abuse Actions) Bill 2015 (WA).
[31] In Queensland two Bills have been introduced to Parliament. The Premier, introduced Limitation of Actions (Institutional Child Sexual Abuse) and Other Legislation Amendment Bill 2016. A private members Bill, Limitation of Actions and Other Legislation (Child Abuse Civil Proceedings) Amendment Bill 2016 was also introduced by Hon Christopher Pyne MP. The private members Bill applies to all child abuse claims, whereas the other applies only to claims arising from institutional child sexual abuse.
[32] Tasmania Government, Response to the Royal Commission into Institutional Responses to Child Sexual Abuse in relation to the Redress and Civil Litigation Consultation Paper, available at https://www.childabuseroyalcommission.gov.au/getattachment/b094fa4f-0bc8-47cd-bf41-9a0ac6847466/Tasmanian-Government .
[33] Northern Territory Government, Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse, available at https://childabuseroyalcommission.gov.au/getattachment/eea248b6-d82f-470d-9c5f-631094db53a6/Northern-Territory-Government
[34] Above n 22, at [99].
[35] Above n 1, at [105].
[36] Above n 27, at 457.